United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1015

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARY JEAN ASKEW,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

ROGER P. WILLIAMS,
Assistant United States Attorney,
of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-3827

TABLE OF CONTENTS.

TABLE OF CASES.

STATUTES.

In the

United States Court of Appeals

For the Second Circuit

Docket No. 75-1015

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARY JEAN ASKEW,

Defendant-Appellant.

BRIEF OF APPELLEE

Preliminary Statement

On December 3, 1973, the defendant, Mary Jean Askew, was charged by the United States Grand Jury in a sixteen (16) count indictment with knowingly making false material declarations with respect to her receiving and cashing numerous checks payable to K. L. Willis issued by the State of New York, Unemployment Insurance Fund and directed to K. L. Willis at 83 Brunswick Blvd., Buffalo, New York; all in violation of Title 18, United States Code, Section 1623.[1]

Prior to commencement of trial on November 11, 1974 before the Hon. Lloyd F. MacMahon, United States District

---

[1] Section 1623(a) provides that: "Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes false material declaration . . . shall be fined not more than $10,000 or imprisoned more than five years, or both."

Court Judge for the Southern District of New York sitting in the Western District of New York by designation, the government moved to dismiss Counts Six (6) to Ten (10) of the indictment (Appendix 7-10, T. 4).[2] At the conclusion of the government's case (112) and after various motions by the defendant, she rested without putting on proof (126). Following the court's charge to the jury on November 12, 1974, it dismissed Count Sixteen (16) on its own motion (140). Less than four hours later the jury returned with a verdict of guilty on each of the ten remaining counts, namely, Counts One (1) through Five (5) and Eleven (11) through Fifteen (15).

On January 9, 1975, the defendant was sentenced to the custody of the Attorney General for a period of eighteen (18) months.[3] A Notice of Appeal was timely filed from that conviction.

Statement of Facts

The grand jury began an investigation on July 31, 1973 into allegations of an alleged conspiracy or scheme to defraud the New York State Unemployment Insurance Fund by use of the mails (A. 22). That investigation led to the return on December 17, 1973, some four and one-half months later, of a Forty-eight (48) Count indictment against seven defendants, one of whom was Askew, charging them with violations of Title 18, United States Code, Sections 371, 1341 and 1342 (see Appellant's Brief, pp. 2 and 11). During the course of that investigation numerous witnesses were called and voluminous documents examined. Subsequent thereto, a new grand jury heard additional evidence which led to the return of a superseding Seventy-one (71) Count indictment against nine defendants filed on September 12, 1974.

---

[2] The second reference is to the Trial Transcript.

[3] Judgment and Commitment appended hereto.

Former Assistant United States Attorney James Grable testified that at the outset of the investigation he had information that claims for unemployment benefits were made by fictitious individuals against both existing and non-existent businesses. One such claim was made by an individual with the name of Kathryn Lee Willis who represented that she worked for an employer by the name of Cook & Green Auto Wash with a business address listed as 83 Brunswick Boulevard, Buffalo, New York. Investigation further revealed that that address was a two-family home owned by Mary Jean Askew (A. 24-25).

Based upon that information, Grable caused a subpoena to issue to Mary Jean Askew directing her to appear before the Federal Grand Jury on August 8, 1973 (A. 27-28). Prior to questioning her before the grand jury, Grable first advised her in his office that anything she said in the grand jury could be used against her and that if she testified falsely before the grand jury a charge of perjury could be placed against her (A. 28). Then in the grand jury he fully advised Askew of her rights under *Miranda*[4] and the ramifications of a perjurious statement (A. 34-36, Appellant's Brief, pp. 4-5).

Other than the above and except as specifically noted on the appropriate points in the argument, the Statement of Facts prepared by the appellant is sufficient.

---

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

ARGUMENT

POINT I

This issue as to whether or not the defendant's perjurious testimony given before the grand jury should have been suppressed by the trial court is not properly before this court.

The Appellant's chief complaint is that since her appearance before the grand jury on August 8, 1973 placed her in the same position as the defendant in *Mandujano*,[5] this court should, either under Rule 52(b) of the Federal Rules of Criminal Procedure or in the exercise of its inherent power to notice error affecting substantial rights or causing manifest injustice, suppressed the testimony and reverse the judgment of conviction.

The circumstances surrounding Askew's appearance before the grand jury, however, is far, far different then those surrounding the appearance of the defendant in *Mandujano*. There, the defendant when called before the grand jury was the only person upon whom the grand jury focused its inquiry. All of the facts and circumstances surrounding his alleged sale of narcotics were known to the prosecutor. The only possibility in calling him was to entrap him into committing perjury. Further, Mandujano was never advised that he had a right to appointed counsel, that what he said could be used against him in a later proceeding or that he had a right to remain silent. See *Mandujano, supra*, at 1051. That case simply relied upon existing strictures where the government uses the grand jury for the sole purpose of preparing an already pending indictment for trial against a single defendant, *United States v. Dardi*, 330 F.2d 316 (2nd Cir. 1964);

[5] *United States v. Mandujano*, 496 F.2d 1050 (5th Cir. 1974)

United States v. Winter, 348 F.2d 204 (2nd Cir.), *cert. denied* 382 U.S. 955 (1965), or seeks to entrap the witness into committing perjury or engages in harassment of the witness. *Winter, supra*, at 210; *United States v. Sweig*, 441 F.2d 114, 121 (2nd Cir. 1971), *cert. denied* 403 U.S. 932; *United States v. DelToro and Kaufman*, ... F.2d ..... (2nd Cir. decided February 27, 1975), Slip Op. 1959, 1974; *United States v. Carvelli*, 340 F.Supp. 1295, 1300 (E.D.N.Y. 1972).

Certainly, where a grand jury investigation is complex, involving many defendants and numerous crimes, as here, calling a putative defendant before the grand jury is perfectly proper. As this court said in *United States v. Sweig, supra*, at 121: "Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know the most about matters under inquiry." The reason is that: "No investigation would be adequate and in any sense complete without at least an effort to glean some small harvest of information from those suspected of being involved." *United States v. Corallo*, 413 F.2d 1306, 1328 (2nd Cir. 1969), *cert. denied* 396 U.S. 958 (1969). See also *United States v. Potash*, 332 F.Supp. 730, 732-733 (S.D.N.Y. 1971). With the information Grable had at the time he called Askew before the grand jury (A. 24-25), she appeared to be one who would have knowledge about the matters under inquiry. The grand jury was conducting an investigation into a complex scheme to conspire to defraud and defraud the New York State Unemployment Insurance Fund. That grand jury heard numerous witnesses and examined voluminous records over a period of four and one-half months before returning an initial forty-eight (48) count indictment against seven defendants, one of whom was Askew.

The self-incrimination clause of the Fifth Amendment does not prohibit the government from ever summoning a target of inquiry or a "potential" defendant before a grand jury. This

court has repeatedly declined to equate the position of a "potential" defendant called before a grand jury with that of one already on trial. *United States v. Sweig, supra; United States v. Winter, supra; United States v. Corallo, supra; United States v. Potash, supra; United States v. Capaldo,* 402 F.2d 821 (2nd Cir. 1968); *United States v. DeSapio,* 435 F.2d 272 (2nd Cir. 1970), *cert. denied* 402 U.S. 999. As this court said in *DelToro and Kaufman, supra,* at 1973: "It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth." Here, as in *DelToro and Kaufman,* Askew was given full *Miranda* warnings even though she was not in custody. She was also fully advised against committing perjury even though there was no legal duty to so advise. See *United States v. Winter, supra.* Askew simply was not the sole target of a grand jury inquiry who was summoned to be entrapped into committing perjury. Some of the comments of the trial judge are very informative on this point. Referring to the verbiage used by the prosecutor in propounding questions to Askew before the grand jury, Judge MacMahon said, "I can't for the life of me understand why the Assistant [United States Attorney] phrased it [questions to Askew] differently in each instance . . ." (119) and, "It was just a terrible question. If he had done any thinking about it, he wouldn't have asked it." (120) and, "Well, it [referring to the indictment containing the language of the questions] certainly ought never to serve as a model" (124).

In any event, the defendant does not challenge the adequacy of the *Miranda* warnings, but the lack of proof of the waiver of her rights. On this question the trial record would support a finding that the warnings had been given and understood. Grable first advised her of her rights under *Miranda* in his office and then repeated those warnings to her in the grand jury (A. 34-35). She responded by saying, "I understand them." (A. 34). Following that Grable asked her if

he had her "Assurance that during the series of questions I am about to ask you and if the grand jury asks you any additional questions that if you are unsure of your rights or unsure of your answer that you would take the Fifth Amendment or invoke your constitutional privilege?" (A. 34). To that she responded, "Yes". (A. 34). See *United States v. Lamia*, 429 F.2d 373 (2nd Cir. 1970), *cert. denied* 400 U.S. 907 (1970); *United States v. Diggs*, 497 F.2d 391 (2nd Cir. 1974), *cert. denied; United States v. Pomares*, 499 F.2d 1220 (2nd Cir. 1974). Moreover, the self-incrimination clause of the Fifth Amendment, while protecting a witness relative to past criminal acts, does not give him a license to commit perjury. *United States v. Winter, supra; United States v. Mandujano, supra.*

In the last analysis, Askew, one of many witnesses called before the grand jury which heard evidence over some four and one-half months and ultimately returned a multiple count indictment against multiple defendants, including her, was not called for the purpose of harassment or to build a perjury prosecution against her. She was fully advised of her rights. Her perjury was overwhelmingly established upon trial. Under these circumstances, the proceedings below were hardly such as to ". . . seriously affect the fairness, integrity or public reputation of judicial proceedings" requiring reversal of the judgment of conviction. Nor were there any obvious errors to be noticed by this court. *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *United States v. O'Connor*, 237 F.2d 466 (2nd Cir. 1956); *On Lee v. United States*, 343 U.S. 747 (1952); *United States v. Rose*, 500 F.2d 12 (2nd Cir. 1974). Therefore, the issue here is not properly raised on this appeal. *United States v. Bell*, 464 F.2d 667 (2nd Cir. 1972), *cert. denied* 409 U.S. 991; *United States v. Indiviglio*, 352 F.2d 276 (2nd Cir. 1965), *cert. denied* 383 U.S. 907; *United States v. Lamia, supra.* Askew has no cause for complaint.

POINT II

Cross-examination was not improperly curtailed.

It is axiomatic that appellate courts will review a trial court's discretionary limitation of cross-examination with great deference. *Alford v. United States*, 282 U.S. 687 (1931); *United States v. Dorfman*, 470 F.2d 246 (2nd Cir. 1972), *cert. denied* 411 U.S. 923 (1973); *United States v. Jenkins*, ... F.2d ..... (2nd Cir. decided February 10, 1975) Slip Op. 1763, 1770-1771. Here, not only did Judge MacMahon not abuse his discretion, he did not limit cross-examination. He merely asked trial counsel the materiality of his question put to Postal Inspector LeRoy Traub as to the source of one of the handwriting exemplars (Ex. 34). Trial counsel simply did not pursue the matter but moved on to another area of questioning (A. 31-32). The court's inquiry as to materiality is far different from the court forbidding the question.

POINT III

The court did not abuse its discretion in imposing a sentence of eighteen months incarceration.

Conviction under Title 18, United States Code, Section 1623 provides that a defendant shall be fined not more than $10,000 or imprisoned not more than five years, or both. The eighteen month term imposed by Judge MacMahon was well within the statutory limits and it is axiomatic that federal district court judges are given vast discretion in the imposition of sentences. Sentences within the statutory limits are generally not subject to review. *Gore v. United States*, 357 U.S. 386 (1958); *United States v. Jones*, 444 F.2d 89 (2nd Cir. 1971); *Whitfield v. United States*, 376 F.2d 5 (8th Cir. 1967), *cert. denied* 389 U.S. 883 (1967); And certainly, "Not where the sentence is not so irrational as to amount to a denial of due process." *United States v. Velazquez*, 482 F.2d 139, 142 (2nd Cir. 1973).

Conclusion.

The judgment of conviction should, in all respects, be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

ROGER P. WILLIAMS,
Assistant United States Attorney,
of Counsel.

United States District Court

DEFENDANT: MARY JEAN ASKEW

DISTRICT: WESTERN DISTRICT OF NEW YORK

DOCKET NO.: Cr-1973-362

DATE OF ORIGINAL JUDGMENT OR LAST AMENDED JUDGMENT

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH January DAY 9 YEAR 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived appointment of counsel

[X] WITH COUNSEL Patrick Baker, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~XXXX~~ verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of having duly taken an oath that she would testify truthfully in a proceeding before the United States Grand Jury, which had been duly impaneled and sworn in the United States District Court, for the Western District of New York, did unlawfully and knowingly make certain false and material declarations to the said Grand Jury, in violation of Section 1623, Title 18, U.S.C. (Cts. 1 thru 5, and 11 thru 15)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

Eighteen (18) Months on each of Counts One thru Five, and Eleven thru Fifteen, to run concurrently with each other.

Counts Six thru Ten and Count Sixteen dismissed during trial.

FILED
JAN 3 1975
AT O'C
WILLIAM M. SCHMIDT, CLERK

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and may issue a warrant and revoke probation during the period of probation. The Court may order probation to run consecutively or concurrently with any other sentence already imposed or any sentence to be imposed for any crime committed within the probation period. The Court may withdraw approval of an installment schedule for payment of fine or restitution or assessment for any default occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

[illegible]

SIGNATURE OF JUDGE

[X] JUDGE

[ ] MAGISTRATE

/s/ Lloyd F. MacMahon

LLOYD F. MacMAHON, U.S. District Judge

DATE: January 29, 1975

1a

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Mary Jean Askew
Docket No. 75-1015

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 18 day of April, 19 75 I mailed 2 copies of a printed Briefs in the above case, in a sealed, postpaid wrapper, to:

Doyle, Diebold, Burmingham & Gorman, Esqs.
1 40 Statler Hilton Hotel
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Roger F. Williams, Assistant U. S. Attorney
502 U. S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this
18 day of April, 19 75

A. [illegible]
NOTARY PUBLIC State of N. Y., Genesee County
My Commission Expires March 30, 19[illegible]